

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEAN IRENE HAMLIN
Claimant

VS.

JOHNSON COUNTY NURSING CENTER
Respondent
Self-Insured

AND

WORKERS COMPENSATION FUND

Docket Nos. 158,633
& 158,634

ORDER

The respondent requests review of the Award entered by Administrative Law Judge Alvin E. Witwer dated November 30, 1995. The Appeals Board heard oral arguments in Kansas City, Kansas on March 19, 1996.

APPEARANCES

The respondent appeared by its attorney, Karen D. Pendland of Kansas City, Missouri. The Workers Compensation Fund appeared by its attorney, John W. Nitcher of Lawrence, Kansas.

RECORD AND STIPULATIONS

The record reviewed by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Docket No. 158,633. Date of Accident - September 6, 1990

The Administrative Law Judge found the Workers Compensation Fund had no liability in this docketed case because the evidence failed to establish that claimant had a preexisting impairment or handicap at the time of her September 6, 1990 accident. Although the respondent requested review of that finding in its Application for Review, at oral argument the respondent's counsel advised the Appeals Board that respondent did not request review of this docketed case and that the decision of the Administrative Law Judge in this proceeding should be affirmed.

Docket No. 158,634. Date of Accident - February 1991 Through APRIL 1, 1991

The Administrative Law Judge found that the Workers Compensation Fund had no liability in this proceeding because the evidence failed to separate or apportion the benefits

payable for the injury that occurred on September 6, 1990 from those payable for the subsequent injury that allegedly occurred from February 1991 through April 1, 1991 and the Judge could not, therefore, determine Fund liability. The respondent requested the Appeals Board to review that finding. The sole issue on this review is the liability of the Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be affirmed.

Claimant worked for the respondent as a physical therapy restorative aide. On September 6, 1990 claimant injured her right shoulder when she attempted to prevent a resident from falling. In October 1990, Larry F. Frevert, M.D., performed surgery on claimant's shoulder to repair a torn rotator cuff and later referred her to physical therapy. During therapy claimant experienced increased pain and reported the symptoms to Dr. Frevert. As of February 1, 1991, Dr. Frevert believed it was possible that claimant may have re-torn her rotator cuff during therapy, although it was more probable she had only torn some scar tissue. Claimant returned to work for the respondent in February 1991 and experienced progressively worsening symptoms.

In May 1991 Dr. Frevert performed two separate arthroscopies of claimant's right shoulder. The first was unsuccessful due to equipment failure. The second procedure identified a partial tear of the rotator cuff which was then debrided. Claimant testified she understood the doctor repaired both old and new tears in this procedure.

The parties stipulated to the admission of the June 26, 1992 medical report of board-certified orthopedic surgeon Kenneth L. Wertzberger, M.D. Dr. Frevert did not testify, although his notes were admitted into evidence without objection. Additionally, respondent presented the testimony of P. Brent Koprivica, M.D., a physician board certified in emergency medicine and experienced in the treatment and rating of industrial injuries.

Dr. Wertzberger believes claimant sustained only one injury, rather than two injuries, with that being on September 6, 1990. Dr. Koprivica initially testified that claimant sustained a 5 percent whole body functional impairment as a result of the September 1990 accident and an additional 5 percent whole body functional impairment as a result of the injuries claimant sustained during the period of February 1991 through April 1, 1991. However, on cross examination, after given the history contained in Dr. Frevert's office notes dated February 1, 1991, Dr. Koprivica testified that it was probable that claimant sustained an aggravating injury during physical therapy and that he was unable to determine or apportion, without additional information, the percentage of claimant's impairment that arose from the physical therapy versus the percentage that arose from her returning to work for the respondent.

Based upon this evidence, the Appeals Board finds that the respondent has failed to satisfy its burden of proof. Although respondent retained claimant in its employment with knowledge of her right shoulder impairment, which did constitute a handicap in her obtaining or retaining employment, the evidence fails to establish the extent of functional impairment, if any, claimant sustained as a result of her work activities during the period of February 1991 through April 1, 1991. Likewise, the evidence fails to establish an apportionment between the impairment sustained as a result of the alleged subsequent injury and claimant's ultimate impairment and disability. As indicated by the Administrative Law Judge, the Workers Compensation Fund is neither responsible for the benefits due claimant for the September 1990 injury nor any additional impairment sustained by claimant as a result of treatment and therapy for that injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated November 30, 1995 should be, and hereby is, affirmed. The Appeals Board hereby adopts the orders of the Administrative Law Judge and incorporates them by reference as its own as if fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Karen D. Pendland, Kansas City, MO
John W. Nitcher, Lawrence, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director